

**Before the
Commission on Common Ownership Communities
Montgomery County, Maryland**

In the Matter of

Vivien Szu-Tu and Daniel A. Bean	x	
10719 Mist Haven Terrace	x	
Rockville, MD 20852,	x	
	x	
Complainants,	x	
	x	
v.	x	Case No. 669-O
	x	August 5, 2004
Timberlawn South/Tuckerman Walk	x	
Homeowners Association	x	
c/o Brian E. Barkley, Esquire	x	
Barkley & Kennedy, Chartered	x	
Suite 1407	x	
51 Monroe Street	x	
Rockville, MD 20850,	x	
	x	
Respondent.	x	

DECISION AND ORDER

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to §§ 10B-5(I), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission having considered the testimony and evidence of record, it is therefore found, determined and ordered as follows:

Background

Vivien Szu-Tu is the owner of and resides with her husband Daniel A. Bean at 10719 Mist Haven Terrace, a house within the community covered by the Timberlawn South/Tuckerman Walk Homeowners Association documents and covenants. On September 28, 2003, Ms Szu-Tu filed a complaint with the Office of Common Ownership Communities alleging that the Board of Directors of the Timberlawn South/Tuckerman Walk Homeowners Association (TS/TW HOA) was failing to perform community maintenance responsibilities, particularly snow removal, and was selectively enforcing use restrictions in the Declaration and parking rules under the community parking regulation.

On behalf of TS/TW HOA, counsel responded that reasonable efforts have been made to remove snow adequately and without blocking storm sewers, that the Association Board of

Directors does not have authority to inspect the internal use of units, and that the Association has addressed the parking concerns raised by Complainant.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to § 10B-11(e) on March 3, 2004. The Commission voted that the allegations regarding selective enforcement of the use restrictions and the parking regulation were within the Commission's jurisdiction but that the allegations regarding snow removal were not. A hearing was scheduled for June 23, 2004.

Findings of Fact

On behalf of himself and Ms Szu-Tu, Mr. Bean offered an opening statement in which he indicated that they considered Ms Szu-Tu's letter to the TS/TW HOA Board of Directors dated May 13, 2003 as a baseline and argued that it should never have been necessary for Ms Szu-Tu to write that letter.

Mr. Barkley opened by indicating that his client believed that the parking issue had been resolved by the time of the hearing and that the issue regarding the operation of a commercial business in a unit within the community had also been resolved by issuance of the appropriate permit.

Ms Szu-Tu's letter of May 13, 2003 describes the consequences of having motorcycles parked at curbside parallel to the curb and perpendicular to the parking space lines. She points out that such parking allows the motorcycle owner to reserve the parking space so used and subjects those parking in adjacent spaces to potential damage to their vehicles. She delineates provisions of the community parking regulation, Administrative Resolution 0196, which she is alleging are violated by this practice and seeks more vigorous enforcement of the regulation. Her complaint to the Commission adds her contention that having vehicles "double" parked behind motorcycles results in the vehicle extending in an unsafe manner and blocking the fire lane.

Surinder Juneja, President of the TS/TW HOA Board of Directors, testified that there had been an ambiguity in the parking regulations regarding the parking of motorcycles at the curb which was clarified in January 2004 and that since the clarification was adopted the practice had been stopped. Mr. Bean, in response to a question from Mr. Barkley admitted that he was not aware of current examples of this practice.

Ms Szu-Tu and Mr. Bean expressed great concern that the extension of a vehicle parked behind a motorcycle beyond the normal depth of a parking space intruded into fire lanes. The parking regulation explicitly prohibits parking in fire lanes. Michael Potter, President of MTM Management Associates, the management company under contract with TS/TW since 1995, testified that there are no designated fire lanes on Mist Haven Terrace. Chapter 22 of the Montgomery County Code, Fire Safety Code, at § 22-23 "Fire Lanes," provides that in order to assure unimpeded passage for fire vehicles the director or his designee may order "no parking – fire lane" signs to be erected and may order the curbs to be painted a distinctive color and other

marking necessary to indicate the limits of the fire lane. The Code further provides that no one may erect or maintain a sign for control of parking or traffic which includes the words "Fire Lane" unless such sign has been ordered by the county executive, the director or their designee.

Mr. Potter agreed to call the Fire Department and request a survey of the community for the need for fire lanes.

With regard to their allegations of selective enforcement of the use restrictions of units within the community, Ms Szu-Tu's letter to the Board of Directors of May 13, 2003, alleged that a commercial enterprise has been expanding over the years to the point of disruption to the neighborhood and beyond the limits permitted in the TS/TW Declaration of Covenants, Conditions and Restrictions. Their complaint to the Commission alleged that the owner/resident of 10704 Mist Haven Terrace, who owns multiple units in the community operates Second Language Testing Institute (SLTI) out of his unit at 10713 Mist Haven Terrace since 2001. Further they stated that at a surprise visit from the permitting investigator at 10713 there was one full-time employee and several consultants working out of the unit.

The TS/TW Homeowners Association Declaration of Covenants, Conditions and Restrictions, Article VI, "Use Restrictions and Easements" at §§ 1 and 2, states:

The Lots shall be used for residential purposes exclusively, and no Building shall be erected, altered, placed or permitted to remain on any such Lot other than one used as a single-family dwelling, except that a professional office may be maintained in a dwelling, provided that such maintenance and use is in strict conformity with the provisions of any applicable zoning law, ordinance or regulation. As used in this Section, the term "professional office" shall mean rooms used for office purposes by a member of any recognized profession, including doctors, dentists, lawyers, architects and the like, but not including medical or dental offices. The terms "dwelling" or "dwelling unit", as used in this Declaration, shall mean a townhouse. Nothing contained in this Article, or elsewhere in this Declaration, shall be construed to prohibit the Declarant from the use of any Lot or dwelling, or improvement thereon, for promotional or display purposes, or as "model homes", a sales office or the like.

No part of the Property shall ever be used or caused to be used or allowed or authorized in any way, directly or indirectly, for any business, commercial, manufacturing, mercantile, storing, vending or other such non-residential purposes, except Declarant may use the Property for model home sites and display and sales or construction offices during the construction and sales period.

Ms Szu-Tu complained to the Montgomery County Department of Permitting Services about the business being conducted at 10713 Mist Haven Terrace. A County employee visited 10713 Mist Haven Terrace on September 4, 2003. It was agreed that there was one non-resident employee. Since a Home Occupation as regulated by the County qualifies as "No Impact" only

when there are no non-resident employees this situation was found to be a “Registered” Home Occupation, which requires a certification and allows one non-resident employee, five client visits per day and 20 client visits per week.

Both Mr. Juneja and Mr. Potter testified that the Registered Home Occupation use of 10713 Mist Haven Terrace is in compliance with the Declaration.

Mr. Bean testified that the Declaration restricts use of the units to no impact professional use. However, the language from the Declaration quoted above does not use that term. It does say that the use for a professional office is “limited to the person actually residing in the dwelling.” This language clearly restricts the use of the units for professional use to a resident of the unit. But it is not so clear that it restricts the use to prohibit having an employee.

Discussion

Ms Szu-Tu and Mr. Bean have high expectations of the TS/TW Homeowners Association Board of Directors and management company. These expectations are beyond what the Board of Directors and management company consider to be necessary responsibilities for themselves. This kind of misunderstanding and difference in expectations are not unusual in common ownership communities.

Ms Szu-Tu and Mr. Bean have clearly been very frustrated at the length of time that it took for the community to enforce the parking policy with regard to motorcycles. They have a number of other complaints about community quality of life and management services beyond the scope of this case which were mentioned or alluded to in the hearing in this matter.

Further, it was Ms Szu-Tu who called the County Department of Permitting Services to come and check that the professional use of 10713 Mist Haven Terrace was in accordance with applicable zoning law, ordinance or regulation. Ms Szu-Tu and Mr. Bean indicate that they believe such enforcement should be undertaken by the Board of Directors or the management company. It is also clear that in the view of Ms Szu-Tu and Mr. Bean the impact of the business conducted in this unit near their house has an unacceptable impact on the neighboring area.

These complaints are outside of the jurisdiction of the Commission or are within the judgment and discretion of the Board of Directors.

Conclusions of Law

The TS/TW Homeowners Association is now enforcing the community parking regulations in accordance with the terms of those regulations and the problem with motorcycle parking described in the complaint is resolved.

The professional use at 10713 Mist Haven Terrace now comports with County law and in the view of the President of the Homeowners Association Board of Directors also complies with the Declaration. The language of the Declaration limits professional use of a unit to the

person actually residing within the unit but does not explicitly state that there also may be no other employee, nor does the Declaration include other explicit limitations. In the absence of a clear prohibition against any employees in a professional office in the Declaration, the Commission ought not to read one in. Maryland courts have ruled that when there is a doubt as to the intention of the parties in a covenant running with the land, it ought to be interpreted to keep the restriction on use within the narrowest limits and favor freedom of use of the property. See *Harbor View Improvement Assn. V. Downey*, 270 Md. 365 at 371-72, 311 A.2d 422 (1973).

ORDER

In view of the foregoing, and based on the evidence of record, the Commission denies the relief requested in this complaint.

This decision and order is concurred in by panel members Kivitz, Smith and Stevens.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to Rule 7-203, Maryland Rules of Procedure.

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership
Communities

S:\Files\recurring\Consumer\Consumer\OCOC\OCOC Cases\szutu669o Decision and Order.doc